

February 23, 1999

MEDIA  
ACCESS  
PROJECT

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals  
445 Twelfth Street, SW  
Washington, DC 20554

RECEIVED

FEB 23 1999

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Re: MM Docket No. 97-247

Dear Ms. Roman Salas:

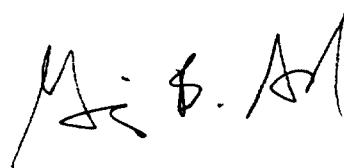
Pursuant to Section 0.231 of the Commission's rules, 47 CFR §0.213, UCC, *et al.* requests that the Commission accept the attached "Opposition to Petition for Reconsideration" for filing in the above-referenced docket.

The deadline for filing oppositions to Petitions for Reconsideration in this docket was yesterday, February 22, 1999. From 5:15-7:00 PM on that day, counsel for UCC, *et al.* attempted to file its Opposition in the Commission's electronic comment filing system (ECFS) no less than ten times. Although Docket No. 97-247 is included in the ECFS, counsel repeatedly received the message "The Proceeding entered in field 1 is not available for filing in ECFS." Given the hour of the day, it was not possible to make a filing at the Secretary's office.

Grant of this request is warranted. The opposition was ready to be filed in a timely manner, but for inexplicable reasons, the ECFS system would not accept it. A service copy was mailed and faxed yesterday to the party UCC, *et al.* is opposing. Thus, filing at the Secretary's office one day late will not impair consideration of the pleading either by the Commission staff or the parties involved.

Thank you for your consideration.

Sincerely,



Gigi B. Sohn  
Counsel for UCC, *et al.*

FILED FOR REC'D 019  
DOE

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

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FEB 23 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Fees for Ancillary or Supplementary Use of Digital  
Television Spectrum Pursuant to Section 336(e)(1)  
of the Telecommunications Act of 1996

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MM Docket No. 97-247

To the Commission:

**OPPOSITION TO PETITION FOR RECONSIDERATION**

The Office of Communication Inc., of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project ("UCC, *et al.*") respectfully oppose the Petition for Reconsideration of the Commission's *Report and Order*, FCC No. 98-303 (released November 19, 1998) filed by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (NAB/MSTV Petition). The NAB/MSTV Petition alleges, *inter alia*, that the Commission erred in setting a fee for ancillary or supplementary digital TV services based on the value of broadcast spectrum as opposed to non-broadcast spectrum.

The Commission's decision to use broadcast spectrum as the fee determinant was correct and reasonable under the plain language of the fee statute, 47 USC §336(e). Regardless of what broadcasters may do with their excess digital TV capacity, they were given exclusive use of spectrum that is specifically reserved for broadcasting. Moreover, and contrary to what NAB/MSTV believes, the value of the portion of the spectrum for ancillary and supplementary services cannot be separated from the value of the spectrum used for free-over-the-air broadcasting, as the former services will be provided and marketed in conjunction with the latter. That the Commission accepted this argument, and rejected NAB/MSTV's argument, does not rise to

the level of arbitrary and capricious.

**ARGUMENT: THE COMMISSION REASONABLY DETERMINED THAT AUCTION RATES FOR NON-BROADCAST SPECTRUM WERE NOT THE PROPER BASIS FOR DETERMINING ANCILLARY OR SUPPLEMENTARY FEES.**

At the core of NAB/MSTV's Petition is its claim that the Commission erred in setting a fee based on its "conclu[sion] that analogies to non-broadcast spectrum should be disregarded because it was dealing with the fees for services to be offered over broadcast channels." NAB/MSTV Petition at 3. Because "subscription ancillary and supplementary services offered by digital television broadcasters will be *non-broadcast* uses of spectrum," NAB/MSTV argue that "evidence from auctions of spectrum for non-broadcast uses provides the closest analog for determining the value of the spectrum which broadcasters may employ in offering such services." *Id.* at 4 (emphasis in original).

As the NAB itself recognizes, Section 336(e) of the 1996 Act gives the Commission broad discretion in setting fees for ancillary or supplementary services. NAB/MSTV Petition at 1. Section 336(e) provided three explicit, broad guidelines for the Commission in determining fees. Congress required that fees be designed

- 1) "to recover for the public a portion of the value of the public spectrum resource made available for such commercial use"; 47 USC §336(e)(2)(A)
- 2) "to avoid unjust enrichment" *Id.*; and
- 3) to "recover for the public an amount, that, to the extent feasible, equals, but does not exceed...the amount that would have been recovered had such services...[been auctioned] pursuant to the provisions of Section 309(j)." 47 USC §336(e)(2)(B)

Congress did not, either in the plain language or the legislative history of the 1996 Act, tell the FCC what value it should assign the spectrum or provide it with quantitative parameters for the fee. Since Congress left that decision to the Commission as the expert agency, the

Commission has broad discretion in doing so unless its decision is otherwise arbitrary and capricious. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

The Commission correctly determined that the value of non-broadcast spectrum was not the proper basis for setting fees under Section 336(e). Regardless of what uses broadcasters might ultimately make of their excess digital capacity, the spectrum they were given, for free, is *broadcast* spectrum which is specifically reserved in the most favorable portion of the electromagnetic band. See UCC Reply Comments at 9. Moreover, NAB/MSTV's valuation of the spectrum does not take into account the fact that broadcasters did not have to compete for the right to use the spectrum. That exclusivity has great value. See UCC Reply Comments at 10.

Most important, as UCC *et al.* and others have argued, broadcast spectrum is the only proper reference for calculating ancillary or supplementary fees because the value of the spectrum that will be used for ancillary or supplementary services cannot be divorced from that which they will use for free, over-the-air broadcasting. UCC, *et al.*'s media economics expert, Douglas Gomery, explained these synergies thus:

Building upon free, over-the-air advertising based broadcasting, the major companies owning television stations -- and converting from analog to digital -- can exploit and leverage other media production and distribution units that make up their vast enterprises. They then can use this cross-ownership to leverage the ancillary or supplementary services, built on their broadcast licenses. Sports broadcasts can offer up-to the minute scores; news shows can offer supplementary and individualized information; many other examples exist. Cross ownership gives the commercial broadcaster a unique place to build and exploit through the ancillary or supplementary channels.

Statement of Dr. Douglas Gomery at 14, Appendix A to UCC, *et al.* Reply Comments filed in MM Docket 97-248. See NCTA Comments at 12 ("because the spectrum...will remain free to the extent that it is used for advertiser-supported services, broadcasters may have the

ability and incentive to subsidize their feeable services with revenues from non-feeable services and to price ancillary and supplementary services well below the true full cost...of providing them.")<sup>1</sup>

In any event, the Commission's decision to base its fees on the value of broadcast spectrum is certainly reasonable based on the record of this proceeding. Although NAB/MSTV act as if they were the only parties that presented "evidence" to the FCC on this issue other parties submitted their own analyses of the proper spectrum value and came to a wholly different conclusion. See NCTA Comments at 12; UCC, *et al.* Reply Comments at 9-12. For example, as discussed above, UCC, *et al.*'s media economics expert concluded that the value of broadcast spectrum was the proper basis for the fees and that the value of that spectrum was "high and climbing" because "electronic mass media continue to exert monopoly control of spectrum through exclusive licenses [and therefore] many more people want to own a broadcast license than are able to do so." Gomery Statement at 14. Considering broadcast spectrum values and the types of gross revenue fees other private parties pay for the use of public property, Dr. Gomery concluded that the "initial [fee] level ought to be at least 10 percent of feeable revenues because of the high profit potential, and to prevent 'unjust reward.'" Gomery Statement at 21.

Moreover, and contrary to NAB/MSTV's claim, the Commission did not "fail[ ] to consid-

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<sup>1</sup>At least one broadcaster is trumpeting these synergies to its investors, if not to the Commission:

As we focus on maximizing our station's capacity to transmit programming and information digitally to viewers, we are also pioneering business models for this new technology. In addition to providing a platform for applications including Internet "push" technology, digital home shopping, music CD and movies, DTV makes it possible for broadcast television to become a viable competitor to both cable and satellite television.

er the evidence submitted by Broadcasters that established the low and declining value of comparable spectrum." NAB/MSTV Petition at 2. That evidence, in the form of an economic study by Professor Jerry Hausman, concluded that the value of the spectrum broadcasters would use for ancillary or supplementary services is low, because there is "a very large discount in auction results for services that face significant business and technological uncertainty."<sup>2</sup>

In fact, the FCC directly addressed Prof. Hausman's argument, and rejected it. Citing the NAB's comments and its accompanying "analyses," the Commission stated that:

We also reject the analogy to recent auction rates for non-broadcast spectrum made by some commenters. These commenters have argued that we should set the fee at a rate lower than five percent based upon analyses they have submitted that purport to demonstrate that the value of non-broadcast spectrum available at auction has been declining in recent months. These commenters argue that these studies demonstrate that the fees for the ancillary or supplementary use of the broadcast spectrum should be set very low, as the fees should recover approximately the amount which would have been received at an auction of the spectrum. We disagree with this argument.

*R&O* at ¶28 citing NAB Comments at 15.

The Administrative Procedure Act requires that the Commission address "major issues of policy" placed before it in a rulemaking proceeding. *South Carolina ex rel Tindal v. Block*,

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<sup>2</sup>Professor Hausman's conclusion that the fee should be based on a low spectrum value because of the "business and technological uncertainty" facing DTV ancillary and supplementary services is dubious. Many of the ancillary and supplementary services that broadcasters can and will provide will not necessarily face "significant business and technological uncertainty." In fact, some of these services, (e.g., subscription television) are already proven winners in the economic marketplace with no technological uncertainties. In addition, the fact that most Americans already have television sets and will willingly buy new digital TV receivers and converter boxes to continue receiving their free over-the-air service puts broadcasters in a far less "uncertain" position than their competitors. UCC, *et al.* Reply Comments at 11 n.7. At least one respected media consultant has concluded that revenue-enhancing digital TV ancillary or supplementary services will be very valuable - possibly generating "30-50% in additional revenues for broadcasters from multicast video and data transmission." "Making the Transition: A New Kind of Television (Rethinking Broadcast TV for the Digital Age) at 2, appended to UCC, *et al.* Comments filed in MM Docket 97-247.

717 F.2d 874, 886 (4th Cir. 1983) *cert. denied*, 465 U.S. 1080 (1984). However, it need not address every comment or every piece of data submitted. *Petry v. Block*, 737 F.2d 1193 (D.C. Cir. 1984). The Commission has examined Professor Hausman's argument regarding comparable spectrum auctions, and decided that as a matter of law, these data are irrelevant. The APA does not require the Commission to examine the results of such auctions after having concluded that they are of no moment. *See ValueVision International, Inc. v. FCC*, 149 F.3d 1204, 1210 (D.C. Cir. 1998) ("When an agency considers a particular factor and rationally concludes that it should not affect its decision, the agency is not acting arbitrarily.")

The Commission was presented with widely divergent arguments on the amount and basis for a proper fee for ancillary or supplementary services. After considering and addressing those arguments, it reasonably "split the baby" and adopted a fee that, if applied properly,<sup>3</sup> will accomplish Congress' twin goals of ensuring that the public is adequately compensated for the use of the DTV spectrum and avoiding unjust enrichment of broadcasters. As NAB/MSTV recognizes, a further indication of the Commission's reasonableness in setting the fee is that it is committed to reviewing, and possibly adjusting the fee within the five year period prescribed by the 1996 Act, taking into account "the actual costs of the development of ancillary or supplementary services." NAB/MSTV Petition at 7; *NPRM* at ¶26. In the absence of any indication that its decision violated the express intent of Congress, the Commission should not upset it.

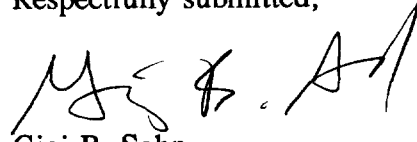
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<sup>3</sup>*UCC, et al.* have filed their own Petition for Reconsideration of the Commission's order, alleging that the Commission erred in failing to apply the 5% fee to certain programming services "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party...." 47 USC §336(e)(1)(B). *See* Petition for Reconsideration filed by UCC, *et al.* in MM Docket No. 97-247.

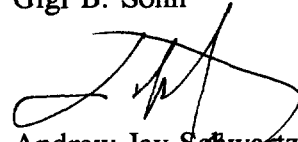
**CONCLUSION**

For the foregoing reasons, the NAB/MSTV Petition for Reconsideration should be denied.

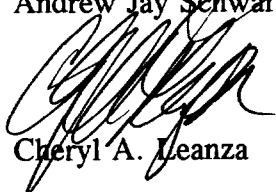
Respectfully submitted,



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Andrew Jay Schwartzman



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Counsel for UCC, *et al.*

February 22, 1999

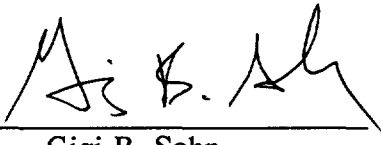


## **CERTIFICATE OF SERVICE**

I, Gigi B. Sohn, hereby certify that I have this 22nd day of February, 1999, mailed by First Class mail, postage prepaid, the foregoing "Opposition to Petition for Reconsideration" to the following:

Henry L. Baumann  
Jack N. Goodman  
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1771 N Street, NW  
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Mary Newcomer Williams  
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Gigi B. Sohn